

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs September 23, 2003

STATE OF TENNESSEE v. ROBERT NEWELL RODGERS

Direct Appeal from the Circuit Court for Blount County
No. C-10201 D. Kelly Thomas, Jr., Judge

No. E2002-02830-CCA-R3-CD
September 26, 2003

The Defendant, Robert Newell Rodgers, was indicted by the Blount County Grand Jury for one count of robbery and one count of assault. Following a bench trial, the Defendant was convicted of robbery, a Class C felony. See Tenn. Code Ann. § 39-13-401(b). The trial court dismissed the assault charge. In this direct appeal, the Defendant argues that the trial court erred by finding him guilty of robbery as opposed to theft and assault. We vacate the Defendant's conviction for robbery and modify the judgment to reflect convictions for theft and assault. The case is remanded to the trial court for entry of new judgments and for sentencing for the theft and assault convictions.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Modified;
Remanded**

DAVID H. WELLES, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT W. WEDEMEYER, JJ., joined.

Shawn Graham, Maryville, Tennessee, for the appellant, Robert Newell Rodgers.

Paul G. Summers, Attorney General and Reporter; Thomas E. Williams, III, Assistant Attorney General; Mike Flynn, District Attorney General; Edward P. Bailey, Jr. and Kirk Andrews, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Peggy Patterson testified that on February 4, 1997, she was employed as the manager of security for the Sears store in the Foothills Mall. She observed the Defendant coming down an aisle of the store between the hardware section and the sporting goods section. The Defendant was carrying a large, empty Sears plastic bag. Ms. Patterson watched as the Defendant picked up a large tool set and placed it inside the plastic bag he was carrying. The Defendant then left the Sears store through a side door without paying for the tool set. Ms. Patterson confronted the Defendant on the sidewalk outside the door. She displayed her store security badge and requested that he accompany her back inside to the store office. The Defendant attempted to run from Ms. Patterson, but she

grabbed him with both hands to prevent him from fleeing. The Defendant and Ms. Patterson struggled first on the sidewalk in front of the store, then across a fire lane and road, and finally into the mall parking lot. In the parking lot, the Defendant shoved Ms. Patterson with the toolbox, which fell to the ground in the process. Nevertheless, Ms. Patterson maintained her grip on the Defendant. The Defendant then punched Ms. Patterson in the face and arms with his fists, and he kicked her in the lower part of her abdomen. This attack caused Ms. Patterson to let go of the Defendant, and he fled. However, alert members of a construction crew who were working nearby gave chase, and eventually the Defendant was apprehended by two police officers.

Patti Law testified that she was sitting in her van in the Sears parking lot of the Foothills Mall after paying a bill in the Sears store. She saw the Defendant and Ms. Patterson in front of her van, both of them holding onto a large package. She stated that the Defendant pushed Ms. Patterson with his hand; then he struck her on both sides of her neck with his fists. Finally, the Defendant kicked Ms. Patterson in the lower abdomen and ran.

The Defendant admitted taking the toolbox from Sears without paying for it. However, he testified that Ms. Patterson approached him in the mall parking lot, not on the sidewalk outside the door. He stated that Ms. Patterson, without showing him her identification, grabbed him and said, "I don't think you paid for that." At that point, the Defendant dropped the bag containing the tool set and ran. He testified that he did not remember hitting Ms. Patterson, and if he did, it was unintentional. He also said that he did not kick her. The Defendant opined that, as he pulled away from Ms. Patterson, perhaps it looked as though he punched and/or kicked her.

Finally, Carmen Stinnett, with whom the Defendant was living at the time of the instant offense, testified that she and the Defendant went to the mall together. From her car in the parking lot, she observed the Defendant exit the Sears store. Ms. Patterson came out after the Defendant and approached him in the parking lot. Ms. Stinnett stated that the Defendant dropped the package he was carrying, but she did not see him punch or kick Ms. Patterson. She said she did not witness any kind of struggle between the two of them over the package.

The Defendant contends that the evidence is insufficient to sustain his conviction for robbery and that he should have rather been convicted of theft and assault. Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." Evidence is sufficient if, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Smith, 24 S.W.3d 274, 278 (Tenn. 2000). In addition, because conviction by a trier of fact destroys the presumption of innocence and imposes a presumption of guilt, a convicted criminal defendant bears the burden of showing that the evidence was insufficient. See McBee v. State, 372 S.W.2d 173, 176 (Tenn. 1963); see also State v. Buggs, 995 S.W.2d 102, 105-06 (Tenn. 1999); State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

In its review of the evidence, an appellate court must afford the State “the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom.” Tuggle, 639 S.W.2d at 914; see also Smith, 24 S.W.3d at 279. The court may not “re-weigh or re-evaluate the evidence” in the record below. Evans, 838 S.W.2d at 191; see also Buggs, 995 S.W.2d at 105. Likewise, should the reviewing court find particular conflicts in the trial testimony, the court must resolve them in favor of the jury verdict or trial court judgment. See Tuggle, 639 S.W.2d at 914. All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact, not the appellate courts. See State v. Morris, 24 S.W.3d 788, 795 (Tenn. 2000); State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987).

“Robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear.” Tenn. Code Ann. § 39-13-401(a). The Defendant cites State v. Owens, 20 S.W.3d 634 (Tenn. 2000), as authority that the proof was insufficient to sustain his conviction for robbery. In Owens, the defendant entered a store, took an article of clothing, and left the store without paying for it. A store supervisor and security guard chased the defendant several blocks. As the supervisor closed in, the defendant dropped the article of clothing, turned to face the supervisor, pulled out a box cutter, and walked away. Id. at 636.

In Owens, our supreme court adopted the common law rule that “the act of violence or of putting a person in fear must precede or be concomitant to or contemporaneous with the taking of the property to constitute robbery. . . .” Id. at 637. Because “the use of violence or fear was subsequent to the taking and temporally remote,” the supreme court reversed the defendant’s conviction for robbery and modified the trial court’s judgment to impose a conviction of theft. Id. at 641-42.

A panel of this Court has had occasion to apply the holding of Owens to a set of facts similar to those in this case. In State v. Frederick Lamar Dixon, No. W2000-00577-CCA-R3-CD, 2001 WL 278092, at *1 (Tenn. Crim. App., Jackson, March 19, 2001), the defendant went to a Home Depot store and left the store with several items, for which he did not pay. A store security officer stopped the defendant five to ten feet outside the store. The defendant became violent when the security officer approached him; he struck the officer and attempted to flee. The defendant was convicted of robbery. However, this Court, relying on Owens, held that the evidence was insufficient to sustain the robbery conviction. See id. at *4. The Court focused on the timing of the theft and the assault and concluded that the theft was completed when the defendant possessed and concealed the merchandise with the intent to deprive Home Depot of the property. See id. However, the assault did not occur until the defendant was outside the store and had been confronted by a store security officer. Therefore, this Court reversed the defendant’s robbery conviction and modified the judgment to a conviction of theft because the assault did not occur prior to or contemporaneously with the theft. See id.

Returning to the facts in this case, it is clear that a theft occurred.¹ The theft was complete when the Defendant concealed the tool kit in the plastic bag with the intent to deprive Sears of the property. However, the Defendant did not assault Ms. Patterson until he left the store, which, according to Ms. Patterson, occurred two to three minutes after he placed the tool set in the plastic bag. Although the assault was not far removed in time or geography from the completed theft, the sequence of events establishes that the assault did not occur prior to or contemporaneously with the theft, as is required in order to sustain a conviction for robbery. See Owens, 20 S.W.3d at 637. Therefore, we conclude that the evidence is insufficient to support the Defendant's conviction for robbery.

The Defendant's conviction for robbery is reversed, and the trial court's judgment is modified to reflect a conviction for theft under \$500 and a conviction for Class A misdemeanor assault.² Further, this case is remanded to the trial court for re-sentencing in accord with the modified judgment.

DAVID H. WELLES, JUDGE

¹Our criminal code states that "[a] person commits theft of property if, with intent to deprive the owner of the property, the person knowingly obtains or exercises control over the property without the owner's effective consent." Tenn. Code Ann. § 39-14-103.

²Ms. Patterson testified that the value of the tools was \$149.99. Therefore, the theft in this case is a Class A misdemeanor. See Tenn. Code Ann. § 39-14-105(1).